Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

RENEE MARKS,

Plaintiff,

v.

US WEST DIRECT,

Defendant-Appellee-Respondent.

DAVID L. SMITH,

Attorney-Appellant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-APPELLANT-PETITIONER

6 PP

QUESTIONS PRESENTED FOR REVIEW

Whether by dismissing Mr. Smith's appeal in the present case for alleged lack of standing to appeal, while refusing to address the issues (including those relating to his standing to appeal independent from that of his former client, Renee Marks) raised and argued by him in his appellate briefs, the Tenth Circuit deprived Mr. Smith of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision under 28 U.S.C. § 1291.

Whether the Tenth Circuit also violated Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654.

Whether unless this Court grants Mr. Smith's petition for a writ of certiorari, the Tenth Circuit's threat to prosecute him for criminal contempt will chill (or freeze) the exercise of these constitutional and statutory rights in other cases being pursued by him.

Whether the United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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CITATIONS OF OPINIONS AND ORDERS

Marks v. U S West Direct, Case No. 98-1043 (10th Cir. December 11, 1998).

JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on December 11, 1998.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the Tenth Circuit's order of December 11, 1998 is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amendment I of the Constitution of the United States provides in relevant part as follows:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides in relevant part as follows:

> . . . [N]or shall any person be . . . deprived of life, liberty or property, without due process of law . . . .

Amendment VI of the Constitution of the United States provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

28 U.S.C. § 1291 provides as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this Title [28 U.S.C. §§ 1292(c), (d), 1295].

28 U.S.C. § 1654 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Pro se attorney-appellant-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

On June 29, 1998, the United States Court of Appeals for the Tenth Circuit issued its opinion denying Mr. Smith's appeals in two federal civil rights cases without addressing the issues raised and argued by him in his appellate briefs. See Howard v. Mail-Well Envelope Company, 150 F.3d 1227 (10th Cir.), cert. denied, ____ U.S. ____, 119 S.Ct. 546, 142 L.Ed.2d 454 (1998). The Tenth Circuit then enjoined Mr. Smith from proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in the Tenth Circuit, unless he first obtains permission to proceed pro se. See id. The Tenth Circuit gave Mr. Smith ten days from the date of its opinion to file written objections, limited to fifteen pages, to these proposed filing restrictions. See id.

On December 11, 1998, the Tenth Circuit issued its order and judgment dismissing Mr. Smith's appeal in the present case for alleged lack of standing to appeal, while refusing to address the issues (including those relating to his standing to appeal independent from that

of his former client, Renee Marks) raised and argued by him in his appellate briefs, which are reproduced in the appendix to this petition for a writ of certiorari, along with the Tenth Circuit's (December 11, 1998) order and judgment.

II. ARGUMENT

Under the foregoing circumstances, the Tenth Circuit deprived Mr. Smith of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision under 28 U.S.C. § 1291. See Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("the obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996) ("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of

McLinn, 739 F.2d 1395 (9th Cir. 1984) ("every party is entitled to a full, considered, and impartial review of the decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997). See also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161,

163 (10th Cir. 1976) ("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972 and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998). The Tenth Circuit also violated Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654. See McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Devine v. Indian River County School Board, 121 F.3d 576 (11th Cir. 1997). Unless this Court grants Mr. Smith's petition for a writ of certiorari, the Tenth Circuit's threat to prosecute him for criminal contempt will chill (or freeze) the exercise of these

constitutional and statutory rights in other cases being pursued by him.[1]

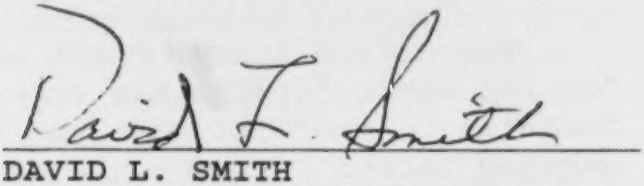
---

[1]/Mr. Smith is pro se attorney-plaintiff in three lawsuits pending in the United States District Court for the District of Colorado seeking damages and other legal and equitable relief against the Regional Transportation District ("RTD"), as well as attorneys and officials associated with the RTD who engaged in a conspiracy to procure, initiate, and continue criminal or quasi-criminal proceedings against him without probable cause and primarily for a purpose other than that of securing the proper adjudication of the charges, claims and allegations on which the proceedings were based, all in violation of 42 U.S.C. §§ 1983, 1985, 1986, the First, Seventh, and Fourteenth Amendments to the Constitution of the United States, and Colorado common law. In addition, Mr. Smith is pro se attorney-plaintiff in a fourth lawsuit pending in the United States District Court for the District of Colorado seeking damages and other legal and equitable relief against his former attorneys for legal malpractice based on negligent or intentional breach of their fiduciary duties of effective assistance of counsel, undivided loyalty, and candor, honesty, and fair dealing.

III. CONCLUSION

The United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Mr. Smith therefore requests this Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and such other and further relief as may be just under the circumstances, including an order under 28 U.S.C. § 2106 reversing and vacating the Tenth Circuit's (December 11, 1998) order.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-APPELLANT-
PETITIONER

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RENEE MARKS,	)	Entered 12/11/98
	)	
Plaintiff-Appellant	)	
	)	
v.	)	No. 98-1043
	)	(D.C. No. 95-WM-
	)	2781)
U S WEST DIRECT,	)	(D. Colo.)
	)	
Defendant-Appellee,	)	
	)	
----------	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	

ORDER AND JUDGMENT[1]

[1]This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before PORFILIO, BARRETT, and KELLY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1.9. The case is therefore ordered submiteed without oral argument.

Plaintiff Renee Marks, pro se, and David L. Smith, a disbarred attorney, see In re Smith, 76 F.3d 335, 336 (10th Cir. 1996), appeal following th district court's grant of summary judgment to Ms. Marks. We dismiss the appeal.

Ms. Marks and Mr. Smith filed and signed a joint notice of appeal to this court. See 10th Cir. R. 3.1. Counsel for US West Direct has notified this court that Ms. Marks is deceased. We determined that Ms. Marks' action would survive her death. See, e.g., Slade ex rel. Slade v. United States Postal Serv., 952 F.2d 357, 360 (10th Cir. 1991) (looking to state law to determine whether Title VII action will survive party's death); Colo. Rev. Stat. § 13-20-101(1) (all actions, except those for

slander or libel, survive party's death though certain identified damages may not be awarded); Smith v. Department of Human Servs., 876 F.2d 832, 836-37 (10th Cir. 1989) (ADEA action seeking certain identifed remedies may survive party's death). Therefore, we entered an order directing Ms. Marks' next of kin or personal representative to enter an appearance and file a brief on behalf of her estate. See Fed. R. App. P. 43(a). No response to this order has been filed. Therefore, we consider Ms. Marks' appeal abandoned and dismiss it. Cf. Abercrombie v. City of Catoosa, 896 F.2d 1228, 1231 (10th Cir. 1990) (any issue not briefed is considered waived); Phillips v. Calhoun, 956 F.2d 949, 953-54 (10th Cir. 1992) (court may dismiss claims not properly argued).

Mr. Smith appeals the district court's denial of his motion to intervene in Ms. Marks' action in that court. The court denied that motion June 21, 1996. Mr. Smith filed his notice of appeal from that order February 2, 1998. Mr. Smith's notice of appeal is untimely as to that issue and the appeal must be dismissed. See Concorde Resources, Inc. v. Woosley (In re Woosley), 855 F.2d 687 (10th Cir. 1988) (nonparty lacks standing to appeal absent most extraordinary circumstances); cf. Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993) (counsel have standing to appeal

orders issued directly against them, but not from those applicable only to their clients).

This appeal is DISMISSED. Defendant's motion for sanctions is DENIED. Mr. Smith's motion to transfer this case to the United States Court of Appeals for the Federal Circuit is DENIED. All remaining outstanding motions are DENIED. The mandate shall issue forthwith.

Entered for the Court

John C. Porfilio
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

	)	Filed 5/18/98
RENEE MARKS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Case No. 98-1043
	)	(D.C. No. 95-WM-
	)	2781)
U S WEST DIRECT,	)	(Dist. of Colo.)
	)	
Defendant-Appellee.	)	
	)	
----------	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	

OPENING BRIEF FOR PRO SE ATTORNEY-APPELLANT DAVID L. SMITH

Attorney-appellant David L. Smith ("Mr. Smith") hereby files his opening brief:

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction of the

United States District Court for the District of Colorado is based on 29 U.S.C. §§ 206(d) and 621-634, and 42 U.S.C. §§ 1981a and 2000e et seq.

Appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit is based on 28 U.S.C. § 1291.

II. ISSUES PRESENTED FOR REVIEW

Whether by issuing her minute orders of November 6, 1995 and December 19, 1995, Judge Weinshienk disqualified Mr. Smith from further representation of Ms. Marks for allegedly violating the Colorado Rules of Professional Conduct.

Whether since these minute orders rested on grounds that could (and did) harm Mr. Smith's professional reputation, dismissal of the underlying case did not preclude appellate review of these minute orders, which exceeded the scope of the District Court disciplinary panel's Disciplinary Order of February 10, 1995.

Whether by issuing her minute orders disqualifying Mr. Smith from further representation of his client, Ms. Marks, in accordance with the terms of their contingent fee agreement, Judge Weinshienk deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living.

Whether since these minute orders were issued without affording Mr. Smith proper notice, or an opportunity to file a brief or otherwise be heard before entry of a final judgment, Judge Weinshienk deprived him of his Fifth Amendment right to due process of law.

Whether Mr. Smith has Article III standing to appeal this blatant and egregious violation of his Fifth Amendment right to due process of law.

Whether even if Mr. Smith has Article III standing to appeal Judge Weinshienk's minute orders disqualifying him from further representation of his client, Ms. Marks, in accordance with the terms of their contingent fee agreement, he is precluded from prevailing on appeal because of the application of the doctrines of res judicata and collateral estoppel.

Whether these doctrines are inapplicable where the appellant did not have a full and fair opportunity to litigate his federal claims.

Whether by issuing its Disciplinary Order of February 10, 1995 without addressing Mr. Smith's defenses to the charges being brought against him in the District Court disciplinary proceedings, and without giving any reasons for its decision, the District Court disciplinary panel deprived him of his Fifth Amendment

right to due process of law.

Whether because of the refusal by Mr. Smith's attorneys to follow the instructions contained in his letter of September 4, 1994, their refusal to follow his additional instructions to make a motion to disqualify United States District Judges Edward W. Nottingham and Daniel B. Sparr from the District Court disciplinary proceedings pending against him, and their refusal to follow the instructions contained in his letter of February 17, 1995, he was left with an inadequate record upon which to base the filing of post-trial motions and an appeal, and was forced to proceed pro se before clearly biased federal judges, who, predictably, denied his post-hearing motions and appeal.

Whether under these circumstances, Mr. Smith did not have a full and fair opportunity to litigate his defenses to the charges being brought against him in the District Court disciplinary proceedings, including his defense that he was deprived of his Sixth Amendment right to the effective assistance of counsel.

Whether Mr. Smith is therefore not precluded from prevailing on appeal because of the application of the doctrines of res judicata and collateral estoppel.

Whether in their Verified Response in Opposition to Motion to Dismiss Appeal of David L. Smith, and Motion for Mr. Smith to Intervene and/or to Represent Ms. Marks on a Hardship Basis (filed on March 4, 1998), Ms. Marks and Mr. Smith argue that by issuing (on January 5, 1998) his Order on Defendant's Motion for Summary Judgment, in which he granted U S West Direct's motion for summary judgment and dismissed Ms. Marks' federal civil rights case with prejudice, Judge Miller deprived Ms. Marks of her First Amendment right to pursue federal civil rights litigation, her Fifth Amendment right to due process of law, and her Seventh Amendment right to a jury trial.

Whether Ms. Marks' enjoyment of these constitutional rights is inextricably bound up with Mr. Smith's wish to pursue these constitutional rights on her behalf.

Whether Mr. Smith is fully, or very nearly, as effective a proponent of these constitutional rights as Ms. Marks.

Whether Ms. Marks is extremely limited in her ability to assert her own constitutional rights because of her lack of financial resources, her lack of legal expertise and her lack of physical health.

Whether under these circumstances, Mr. Smith has Article III standing to assert Ms. Marks' constitutional claims

on appeal.

Whether failure to take an available collateral order appeal forfeits the right to review the order on appeal from a final judgment.

Whether Mr. Smith's failure to appeal within thirty days after Judge Weinshienk issued her Minute Order of June 21, 1996 denying his Motion to Intervene Pursuant to Fed. R. Civ. P. 24 forfeited the right to review this collateral order on appeal from a final judgment.

Whether the Clerk's (April 8, 1998) Order stating that "Mr. Smith's brief shall not address the propriety of the district court's grant of summary judgment to the defendant" is not only contrary to 10th Cir. R. 31.4, which provides that "[i]n civil cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, all parties on a side (including intervenors), except a government entity, must join in a single brief to the greatest extent practicable"; it makes the unwarranted assumption that the panel assigned to hear this appeal on the merits will reject the argument made by Ms. Marks and Mr. Smith in their Verified Response in Opposition to Motion to Dismiss Appeal of David L. Smith, and Motion for Mr. Smith to Intervene and/or to Represent Ms. Marks on a Hardship Basis (filed on March

4, 1998) that Mr. Smith has Article III standing to assert Ms. Marks' constitutional claims on appeal.

Whether if the panel assigned to hear this appeal on the merits rules in Ms. Marks' and Mr. Smith's favor on the foregoing argument, or permits Mr. Smith to intervene and/or to represent Ms. Marks on a hardship basis, there will be no reason for Ms. Marks and Mr. Smith not to file a joint brief on all issues on appeal, as required by 10th Cir. R. 31.4.

Whether by issuing (on April 22, 1998) their Order denying Ms. Marks' and Mr. Smith's Motion for Consideration, Vacation and/or Modification of Clerk's [April 8, 1998] Order, and stating that "appellant's brief remains due May 18, 1998," Circuit Judges Porfilio and Briscoe deprived Mr. Smith of his right to appeal the propriety of the district court's grant of summary judgment to the defendant, in violation of his First Amendment right to access to the courts to petition the government for a redress of grievances, his Fifth Amendment right to due process of law, and 28 U.S.C. § 1291.

III. STATEMENT OF THE CASE

On October 10, 1995, plaintiff-appellant Renee Marks ("Ms. Marks") filed suit against defendant-appellee U S West Direct in the District Court of Larimer County, Colorado alleging four claims for

relief: (1) a claim for intentional and willful violations of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, as amended by the Civil Rights Act of 1991, 42 U.S.C. §§ 1981a; (2) a claim for intentional violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a; (3) a claim for intentional and willful violations of the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and (4) a claim for breach of Ms. Marks' employment contract created by personnel policies, procedures and practices in effect at U S West Direct. Ms. Marks requested to be promoted to Telephone Directory Advertising Consultant with all lost salary, back pay, front pay, benefits and seniority; to be awarded all actual and compensatory damages, including future pecuniary losses and emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, damage to personal and professional reputation, and other nonpecuniary losses; to be awarded punitive or exemplary damages since U S West Direct acted with reckless indifference to her federally protected rights; to be awarded liquidated damages for willful violations of the Age Discrimination in Employment Act of 1967 and the Equal Pay Act of 1963; to be awarded interest (pre- and post-judgment) from the date the action accrued; to be awarded costs (including expert witness fees) and attorney fees; and to be

awarded such other and further legal and equitable relief as may be just under the circumstances. Ms. Marks demanded a trial by jury of all issues so triable. A copy of Ms. Marks' Complaint is attached hereto as Exhibit 1.

On November 2, 1995, U S West Direct filed its Notice of Removal removing Ms. Marks' federal civil rights case from the District Court of Larimer County, Colorado to the United States District Court for the District of Colorado. (Record, Volume I., Document 1.)

On November 6, 1995, United States District Judge Zita L. Weinshienk issued her Minute Order (a copy of which is attached hereto as Exhibit 2) stating that "[b]ecause plaintiff's attorney is not allowed to practice in U.S. District Court, it is ORDERED that plaintiff may have 30 days to obtain substitute counsel." (Record, Volume I., Document 4.) Judge Weinshienk's reference to the fact that "plaintiff's attorney is not allowed to practice in U.S. District Court" is a reference to the fact that on February 10, 1995, the three-judge disciplinary panel of the United States District Court for the District of Colorado (composed of United States District Judges Zita L. Weinshienk, Edward W. Nottingham, and Daniel B. Sparr) issued its Disciplinary Order (a copy of which is attached hereto as Exhibit 3) indefinitely suspending Mr. Smith from the practice of law in the

District Court based on the Order (a copy of which is attached hereto as Exhibit 4) issued on November 29, 1993 by the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Stephanie K. Seymour, Chief Judge, and Bobby R. Baldock and Wade Brorby, Circuit Judges).[1] See In the Matter of David L.

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[1]In its (November 29, 1993) Order, the Tenth Circuit disciplinary panel indefinitely suspended Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals in four federal civil rights cases, and for his failure to comply with court orders to pay more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the District Court (including Judges Weinshienk, Nottingham and Sparr) and the Tenth Circuit, all in alleged violation of the ABA Code of Professional Conduct. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the District Court and the Tenth Circuit has been "satisfied." See id. However, Mr. Smith denies that the appeals he filed from the District Court to the Tenth Circuit were "frivolous." See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (per

curiam) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent). Further, because the disciplinary sanctions imposed against Mr. Smith (i.e., indefinite suspension from the practice of law in the Tenth Circuit) were "punitive, to vindicate the authority of the court," rather than "remedial, and for the benefit of the complainant," they were criminal rather than civil in nature; and he was therefore entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished on the charges being brought against him by the Tenth Circuit disciplinary panel. See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed.2d 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). At the very least, Mr. Smith was entitled to fair notice of the charges being brought against him and an adequate opportunity to be heard with respect to those charges before entry of a final judgment. See Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96

S.Ct. 149, 46 L.Ed.2d 110 (1975); Razotos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990). Therefore, by denying Mr. Smith's requests to hold a hearing, at which he would have the opportunity to present expert testimony and other relevant evidence on his defenses to the charges being brought against him--a blatant and egregious violation of Fed. R. App. P. 46--the Tenth Circuit disciplinary panel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law. See Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Finally, the Tenth Circuit and its disciplinary panel deprived Mr. Smith of his Fifth Amendment right to due process of law by refusing to reinstate him to the practice of law in the Tenth Circuit despite the fact that he has submitted affidavits and

Smith, Disciplinary Action No. 93-DP-28 (D. Colo.), cert. denied, ____ U.S. ____, 117 S.Ct. 359, 136 L.Ed.2d 251 (1996). Mr. Smith may apply for reinstatement to the District Court bar "when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith." See id.

On November 20, 1995, Ms. Marks and Mr. Smith filed Plaintiff's and Her Attorney's Motion to Clarify Status of Legal Representation, and Notice of Plaintiff's Inability to Comply With Minute Order Dated November 6, 1995, in which they said:

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other evidentiary materials showing that he is financially unable to pay all or any part of the more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the District Court and the Tenth Circuit. See Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948) (impossibility of performance constitutes a defense to contempt); United States v. Rylander, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) (the court must consider present inability to comply with the order in question); Tinsley v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir. 1986) (citing Maggio v. Zeitz).

2. Ms. Marks and Mr. Smith do not interpret Judge Weinshienk's (November 6, 1995) minute order as a removal of Mr. Smith as Ms. Marks' attorney in this case. If, however, Judge Weinshienk is considering such a removal, Ms. Marks and Mr. Smith request proper notice, an opportunity to file a brief and a hearing so that they will have a full and fair opportunity to litigate the constitutional and jurisdictional issues before a decision is made on removal.

3. Notice is hereby given that Ms. Marks is financially unable to hire substitute counsel, and is incompetent to proceed pro se against experienced defense counsel. Ms. Marks is therefore unable to comply with Judge Weinshienk's (November 6, 1995) minute order to obtain substitute counsel within 30 days.

(Record, Volume I., Document 7.)

On December 19, 1995, Judge Weinshienk issued the following Minute Order, a copy of which is attached hereto as Exhibit 5:

FURTHER ORDERED that plaintiff's motion to clarify is granted, and the Court will consider plaintiff pro se until she obtains counsel who is permitted to practice

in the United States District Court. David Smith cannot appear in the United States District Court, and therefore he does not have to be "removed." Because Mr. Smith's status will not be relitigated in this action, plaintiff's request concerning Mr. Smith is moot.

(Record, Volume I., Document 10.)

On March 21, 1996, a three-judge panel of the United States Court of Appeals for the Tenth Circuit issued the following Order (a copy of which is attached hereto as Exhibit 6) with respect to Ms. Marks' and Mr. Smith's appeal of Judge Weinshienk's Minute Order of December 19, 1995:

> This appeal is jurisdictionally defective because the order being appealed is not immediately appealable. See 28 U.S.C. § 1291; Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992).
>
> The appellee's motion for sanctions is denied.
>
> The appellants' motion for stay is denied.
>
> APPEAL DISMISSED.

(Record, Volume I., Document 21.)

On April 30, 1996, Judge Weinshienk issued her Minute Order (a copy of which is attached hereto as Exhibit 7) denying Ms. Marks' Motion for a Protective Order, and Motion to Permit Mr. Smith to Represent Ms. Marks on a Hardship Basis. (Record, Volume I., Document 23.)

On June 21, 1996, Judge Weinshienk issued her Minute Order (a copy of which is attached hereto as Exhibit 8) denying Mr. Smith's Motion to Intervene Pursuant to Fed. R. Civ. P. 24. (Record, Volume I., Document 37.)

On January 5, 1998, United States District Judge Walker D. Miller issued his Order on Defendant's Motion for Summary Judgment (a copy of which is attached hereto as Exhibit 9), in which he granted U S West Direct's motion for summary judgment and dismissed Ms. Marks' federal civil rights case with prejudice.[2] (Record, Volume I., Document

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[2]In response to U S West Direct's motion for summary judgment, Ms. Marks filed the Affidavit of Renee Marks in Opposition to Motion for Summary Judgment (including Plaintiff's Deposition Exhibits 1-50) identifying numerous genuine issues of material fact to be resolved by the jury. (Record, Volume I., Document 50.) Ms. Marks' affidavit also identified documents requested from U S West Direct which she was not permitted to discover.

104.)

On January 6, 1998, the Clerk of the United States District Court for the District of Colorado issued its Judgment (a copy of which is attached hereto as Exhibit 10) in favor of U S West Direct and against Ms. Marks, and dismissed the Complaint and cause of action, with each party to bear its own costs. (Record, Volume I., Document 105.)

On February 2, 1998, Ms. Marks and Mr. Smith filed their joint Notice of Appeal from the final Judgment entered on January 6, 1998, and all orders merged therein, including but not limited to, the following: (1) Minute Order issued on November 6, 1995; (2) Minute Order issued on December 19, 1995; (3) Minute Order issued on January 10, 1996; (4) Minute Order issued on April 30, 1996; (5) Minute Order issued on June 21, 1996; and, (6) Order on Defendant's Motion for Summary Judgment issued on January 5, 1998. (Record, Volume I., Document 106.)

On April 8, 1998, the Clerk of the United States Court of Appeals for the Tenth Circuit issued the following Order, a copy of which is attached hereto as Exhibit 11:

> The court reserves judgment on the defendant's motion to dismiss the appeal of David L. Smith. The matter is referred to the panel assigned to hear this appeal on the

merits.

Briefing on the merits shall proceed as follows:

(1) Plaintiff Renee Marks shall serve and file her opening brief within 40 days of the date of this order.

(2) David L. Smith shall serve and file his opening brief within 40 days of the date of this order. Mr. Smith's brief shall address only the issues of the district court's refusal to allow Mr. Smith to represent Ms. Marks and the denial of Mr. Smith's motion to intervene. Mr. Smith's brief shall not address the propriety of the district court's grant of summary judgment to the defendant.

(3) The defendant shall file one answer brief to both Ms. Marks' and Mr. Smith's briefs within 30 days of the later date of service of the opening briefs.

(4) Ms. Marks may serve and file a reply brief within 14 days of the date of service of the defendant's answer brief.

> (5) Mr. Smith may serve and file a reply brief within 14 days of the date of service of the defendant's answer brief. Mr. Smith's reply brief shall address only those issues pertaining to the refusal of the district court to allow him to represent Ms. Marks and the denial of his motion to intervene. Mr. Smith's reply brief shall not address the merits of the district court's grant of summary judgment to the defendant.

On April 22, 1998, Circuit Judges Porfilio and Briscoe issued their Order (a copy of which is attached hereto as Exhibit 12) denying Ms. Marks' and Mr. Smith's Motion for Consideration, Vacation and/or Modification of Clerk's [April 8, 1998] Order, and stating that "appellant's brief remains due May 18, 1998."

IV. ARGUMENT

In its Motion to Dismiss Appeal of David L. Smith and brief in support thereof (filed on February 19, 1998), U S West Direct asserts that Mr. Smith lacks Article III standing to appeal Judge Weinshienk's minute orders of November 6, 1995 and December 19, 1995. However, In Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996), the Tenth Circuit said:

We will dismiss an appeal as moot if it is impossible for this court to grant the appellant any effectual relief whatsoever. In re Material Witness Warrant Nichols, 77 F.3d 1277, 1279 (10th Cir. 1996).

We held in G.J.B. & Assocs., Inc. v. Singleton, 913 F.2d 824, 827 (10th Cir. 1990), that a sanctions order against an attorney currently of record is not immediately appealable as a final judgment where the underlying controversy is unresolved. Further, such an order is not appealable under the collateral order exception to the final judgment rule because it could be appealed by the attorney at the conclusion of the underlying case, even if the parties settle or elect not to appeal. Id. at 827-29.

In United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992), we addressed whether an attorney who no longer was involved in the underlying action because his pro hac vice status had been revoked could take an immediate appeal from the revocation order, even though the underlying case had not been concluded. We held the attorney could not because the order was not a final judgment. Id. at 448. Further, because the attorney was seeking an appeal only to vindicate his reputation, rather than to be

allowed to continue representing his client, we saw no reason why the order could not effectively be reviewed on appeal from the final judgment. Id. at 451. Even the former client's acquittal would not render the revocation order unreviewable at the conclusion of the case. Id. Thus, the order was not appealable under the collateral order exception to the final judgment rule. Id.

These cases establish that settlement of an underlying case does not preclude appellate review of an order disqualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation.[3] We therefore conclude the appeal is not moot insofar as the district court's order found that Attorney Greer had violated the Colorado Rules of Professional Conduct. See Kirkland v. National Mortgage Network, Inc., 884 F.2d 1367, 1370 (11th Cir. 1989) (holding challenge to order

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[3]An attorney would lack standing to challenge the order insofar as it affected only his or her client's rights. Uselton v. Commercial Lovelace Motor Freight, Inc., 9 F.3d 849, 854 (10th Cir. 1993).

> disqualifying attorney was not moot, despite dismissal of underlying case, where order's 'brand of disqualification' on grounds of dishonesty and bad faith could hang over attorney's name and career for years). That the underlying cases were dismissed pursuant to a stipulation for dismissal with prejudice has no effect on the attorneys' right to appeal because they were not parties to the stipulation. Cf. Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 526 (10th Cir. 1992).

See id. at 492-93. By issuing her minute orders of November 6, 1995 and December 19, 1995, Judge Weinshienk disqualified Mr. Smith from further representation of Ms. Marks for allegedly violating the Colorado Rules of Professional Conduct.[4]

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[4]This is not the only time that a judge of the United States District Court for the District of Colorado has issued orders disqualifying Mr. Smith from further representation of his client for allegedly violating the Colorado Rules of Professional Conduct. Similar disqualification orders were issued by United States District Judge Zita L. Weinshienk in Qualls v. Regional Transportation District, et al., Civil Action No. 91-Z-989 (D. Colo.) and Howard v. Mail-Well Envelope Company, et al., Civil Action No. 93-Z-1895 (D. Colo.); by

Since these minute orders rested on grounds that could (and did) harm Mr. Smith's professional reputation, dismissal of the underlying case did not preclude appellate review of these minute orders, which exceeded the scope of the District Court disciplinary panel's Disciplinary Order of February 10, 1995.

By issuing her minute orders disqualifying Mr. Smith from further representation of his client, Ms. Marks, in accordance with the terms of their contingent fee agreement (a copy of which is attached hereto as Exhibit 13), Judge Weinshienk deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a

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United States District Judge Edward W. Nottingham in Seales v. Jefferson County School District, et al., 95-N-189 (D. Colo.); by United States District Judge Daniel B. Sparr in Casillan v. Regional Transportation District, et al., Civil Action No. 90-S-1722; and by United States District Judge Lewis T. Babcock in Saathoff v. FileNet Corporation, Civil Action No. 93-B-2396 (D. Colo.). These orders' "brand of disqualification" on grounds of dishonesty and bad faith could hang over Mr. Smith's name and career for years.

living.[5] See Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Since these minute orders were issued without affording Mr. Smith proper notice, or an opportunity to file a brief or otherwise

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[5]At the time Judge Weinshienk issued her orders disqualifying Mr. Smith from further representation of Ms. Marks, he was a member in good standing of the bar of the State of Colorado, and was entitled to pursue Ms. Marks' federal civil rights case in the District Court of Larimer County, Colorado. It was not until March 3, 1997, that the Colorado Supreme Court issued its order (effective June 6, 1997) indefinitely suspending Mr. Smith from the practice of law in the State of Colorado based on the Tenth Circuit disciplinary panel's suspension Order of November 29, 1993. See People v. Smith, 937 P.2d 724 (Colo. 1997), cert. denied, ____ U.S. ____, 118 S.Ct. 158, 139 L.Ed.2d 103 (1997) (two cases).

be heard before entry of a final judgment, Judge Weinshienk deprived him of his Fifth Amendment right to due process of law. See id.; see also In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razotos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990). Mr. Smith clearly has Article III standing to appeal this blatant and egregious violation of his Fifth Amendment right to due process of law. See Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979) (an attorney has Article III standing to appeal the denial of attorney fees); Lipscomb v. Wise, 643 F.2d 319, 320-21 (5th Cir. 1981) (same); Samuels v. American Motors Sales Corp., 969 F.2d 573, 576 (7th Cir. 1992) (same); U.S. Tippett, 975 F.2d 713, 718 (10th Cir. 1992) (a nonparty witness has Article III

standing to appeal denial of an application for statutory witness fees, just as an attorney has standing to appeal the denial of attorney fees).

U S West Direct asserts that even if Mr. Smith has Article III standing to appeal Judge Weinshienk's minute orders disqualifying him from further representation of his client, Ms. Marks, in accordance with the terms of their contingent fee agreement, he is precluded from prevailing on appeal because of the application of the doctrines of res judicata and collateral estoppel. However, these doctrines are inapplicable where the appellant did not have a full and fair opportunity to litigate his federal claims. See Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). By issuing its Disciplinary Order of February 10, 1995 without addressing Mr. Smith's defenses to the charges being brought against him in the District Court disciplinary proceedings, and without giving any reasons for its decision, the District Court disciplinary panel deprived him of his Fifth Amendment right to due process of law. See In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Further, because of the refusal by Mr. Smith's attorneys to follow the instructions contained in his letter (a

copy of which is attached hereto as Exhibit 14) of September 4, 1994, their refusal to follow his additional instructions to make a motion to disqualify United States District Judges Edward W. Nottingham and Daniel B. Sparr from the District Court disciplinary proceedings pending against him, and their refusal to follow the instructions contained in his letter (a copy of which is attached hereto as Exhibit 15) of February 17, 1995, he was left with an inadequate record upon which to base the filing of post-trial motions and an appeal, and was forced to proceed pro se before clearly biased federal judges, who, predictably, denied his post-hearing motions and appeal.[6] Under these

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[6]Prior to or during the attorney disciplinary proceedings pending against Mr. Smith in the United States District Court for the District of Colorado, Judges Weinshienk, Nottingham and Sparr imposed harsh and unjustified sanctions against Mr. Smith and his clients in federal civil rights cases pending before them. Judges Weinshienk, Nottingham and Sparr then used Mr. Smith's failure to comply with their orders to pay these harsh and unjustified sanctions as part of their alleged basis for suspending him indefinitely from the practice of law in the United States District Court for the District of Colorado. Judges Weinshienk, Nottingham and Sparr suspended Mr. Smith indefinitely from the practice of law in

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the United States District Court despite the fact that he was (and is) financially unable to pay these harsh and unjustified sanctions. During his representation of Mr. Smith in the attorney disciplinary proceedings pending against him in the United States District Court for the District of Colorado, Phillip S. Figa (one of Mr. Smith's attorneys) repeatedly told Mr. Smith and his wife (Denver lawyer M. Julia Hook) that Judges Weinshienk, Nottingham and Sparr "despise" Mr. Smith, his clients, and his federal civil rights cases, and that they hoped he (Mr. Smith) would "take a flying leap off the nearest building." Mr. Figa also repeatedly told Mr. Smith and his wife that he was staying awake nights worrying about whether he would be able to convince biased judges of Mr. Smith's innocence to the charges being brought against him, and that for this reason, Mr. Smith's case was the most "troubling" case he had ever handled. Under these circumstances, it was reasonably questionable whether Judges Weinshienk, Nottingham and Sparr could be fair and impartial decision-makers in the attorney disciplinary proceedings pending against Mr. Smith in the United States District Court for the District of Colorado. See 28 U.S.C. §§ 372(c) and 455(a); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J.,

circumstances, Mr. Smith did not have a full and fair opportunity to litigate his defenses to the charges being brought against him in the District Court disciplinary proceedings, including his defense that he was deprived of his Sixth Amendment right to the effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Smith is therefore not precluded from prevailing on appeal because of the application of the doctrines of res judicata and collateral estoppel.

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concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.2d 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision).

Ordinarily, an appellant may assert only his own constitutional claims. See Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). However, in describing the exceptions to this jus tertii rule, Justice Blackmun said:

> [T]he Court has looked primarily to two factual elements . . . . The first is the relationship of the litigant to the person whose right he seeks to assert. If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the Court at least can be sure that its construction of the right is not unnecessary . . . . Furthermore, . . . the litigant . . . may be . . . fully, or very nearly, as effective a proponent of the right as the [third] party. . . . The other factual element . . . is the ability of the third party to assert his own right.

Id. at 428 U.S. 114-116. In their Verified Response in Opposition to Motion to Dismiss Appeal of David L. Smith, and Motion for Mr. Smith to Intervene and/or to Represent Ms. Marks on a Hardship Basis (filed on March 4, 1998), Ms. Marks and Mr. Smith argue that by issuing (on January 5, 1998) his Order on Defendant's Motion for Summary Judgment, in which he granted U S West Direct's motion for summary judgment and dismissed Ms. Marks'

federal civil rights case with prejudice, Judge Miller deprived Ms. Marks of her First Amendment right to pursue federal civil rights litigation, her Fifth Amendment right to due process of law, and her Seventh Amendment right to a jury trial, citing NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 1331, 129 L.Ed.2d 336 (1994); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("[a] public

official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Henriksen v. Bentley, 644 F.2d 852, 855 (10th Cir. 1981); Shaw v. Neece, 727 F.2d 947, 948 (10th Cir. 1984); McKay v. Hammock, 730 F.2d 1367, 1375 (10th Cir. 1984); Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985); and Ward v. Fort, 762 F.2d 856, 858 (10th Cir. 1985). Ms. Marks' enjoyment of these constitutional rights is inextricably bound up with Mr. Smith's wish to pursue these constitutional rights on her behalf. Mr. Smith is fully, or very nearly, as effective a proponent of these constitutional rights as Ms. Marks. Ms. Marks is extremely limited in her ability to assert her own constitutional rights because of her lack of financial resources, her lack of legal expertise and her lack of physical health. Under these circumstances, Mr. Smith has Article III standing to assert Ms. Marks' constitutional claims on appeal.

U S West Direct asserts that Mr. Smith was required to appeal within thirty days after Judge Weinshienk issued (on June 21, 1996) her Minute Order denying his Motion to Intervene Pursuant

to Fed. R. Civ. P. 24.[7] However, failure to take an available collateral order appeal does not forfeit the right to review the order on appeal from a final judgment. See U.S. v. Martin, 620 F.2d 237, 239 n.1 (10th Cir.), cert. denied, 449 U.S. 890, 101 S.Ct. 248, 66 L.Ed.2d 116 (1980); U.S. v. Padilla, 589 F.2d 481, 483 (10th Cir. 1978). "[A]n absolute denial of intervention is a collateral order and, therefore, is appealable immediately." See Arney v. Finney, 967 F.2d 418, 421 (10th Cir. 1992), citing Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 377, 107 S.Ct. 1177, 1182, 94 L.Ed.2d 389 (1987), Railroad Trainmen v. Brotherhood of Baltimore & Ohio R. Co., 331 U.S. 519, 524-25, 67 S.Ct. 1387, 1390, 91 L.Ed. 1646 (1947), and Gerstle v. Continental Airlines, Inc., 466 F.2d 1374, 1377-78

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[7]Mr. Smith's Motion to Intervene Pursuant to Fed. R. Civ. P. 24 (filed on May 10, 1996) requested intervention of right under Fed. R. Civ. P. 24(a) and permissive intervention under Fed. R. Civ. P. 24(b). (Record, Volume I., Document 26.) This motion was filed after a three-judge panel of the Tenth Circuit issued (on March 21, 1996) its Order dismissing Ms. Marks' and Mr. Smith's appeal of Judge Weinshienk's Minute Order of December 19, 1995 disqualifying him from further representation of his client.

(10th Cir. 1972). In the present case, Mr. Smith did not appeal within thirty days after Judge Weinshienk issued her Minute Order of June 21, 1996 denying his Motion to Intervene Pursuant to Fed. R. Civ. P. 24. However, due to the fact that this failure did not forfeit the right to review this collateral order on appeal from a final judgment, Mr. Smith was not required to appeal within thirty days after Judge Weinshienk issued this collateral order.

The Clerk's (April 8, 1998) Order stating that "Mr. Smith's reply brief shall not address the propriety of the district court's grant of summary judgment to the defendant" is not only contrary to 10th Cir. R. 31.4, which provides that "[i]n civil cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, all parties on a side (including intervenors), except a government entity, must join in a single brief to the greatest extent practicable"; it makes the unwarranted assumption that the panel assigned to hear this appeal on the merits will reject the argument made by Ms. Marks and Mr. Smith in their Verified Response in Opposition to Motion to Dismiss Appeal of David L. Smith, and Motion for Mr. Smith to Intervene and/or to Represent Ms. Marks on a Hardship Basis (filed on March 4, 1998) that Mr. Smith has Article III standing to assert Ms. Marks' constitutional claims on appeal. If the

panel assigned to hear this appeal on the merits rules in Ms. Marks' and Mr. Smith's favor on the foregoing argument, or permits Mr. Smith to intervene and/or to represent Ms. Marks on a hardship basis, there will be no reason for Ms. Marks and Mr. Smith not to file a joint brief on all issues on appeal, as required by 10th Cir. R. 31.4. Therefore, by issuing (on April 22, 1998) their Order denying Ms. Marks' and Mr. Smith's Motion for Consideration, Vacation and/or Modification of Clerk's [April 8, 1998] Order, and stating that "appellant's brief remains due May 18, 1998," Circuit Judges Porfilio and Briscoe deprived Mr. Smith of his right to appeal the propriety of the district court's grant of summary judgment to the defendant, in violation of his First Amendment right to access to the courts to petition the government for a redress of grievances, his Fifth Amendment right to due process of law, and 28 U.S.C. § 1291. See California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994).

V. CONCLUSION

The only condition that has changed since Ms. Marks and Mr. Smith filed (on November 20, 1995) Plaintiff's and Her Attorney's Motion to Clarify Status of Legal Representation, and Notice of Plaintiff's Inability to Comply With Minute Order Dated November 6, 1995 is that Ms. Marks has been diagnosed with bone cancer. Her prognosis for recovery is poor. Mr. Smith therefore requests the Tenth Circuit to grant his and Ms. Marks' joint Motion for Mr. Smith to Intervene and/or to Represent Ms. Marks on a Hardship Basis, and such other and further relief as may be just under the circumstances, including an order declaring void ab initio the Tenth Circuit disciplinary panel's (November 29, 1993) suspension Order and the District Court disciplinary panel's (February 10, 1995) Disciplinary Order, and granting an expedited resolution of this appeal on its merits.

VI. REQUEST FOR ORAL ARGUMENT

Oral argument is requested to address the important issues of first impression raised by this appeal.

Dated this 18th day of May, 1998.

Respectfully submitted,

David L. Smith
Pro Se Attorney-Appellant
1630 Welton Street, #300
Denver, Colorado 80202
(303) 534-0153

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of May, 1998, true and correct copies of the foregoing Opening Brief for Pro Se Attorney-Appellant David L. Smith were placed in the United States mail, postage prepaid, addressed as follows:

Renee Marks
4300 Hummingbird Drive
Fort Collins, Colorado 80526

Raymond W. Martin, Esq.
Nancy E. Berman, Esq.
PARCEL, MAURO & SPAANSTRA, P.C.
1801 California Street, Suite 3600
Denver, Colorado 80202

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

	)	Filed 7/1/98
RENEE MARKS,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Case No. 98-1043
	)	(D.C. No. 95-WM-
	)	2781)
U S WEST DIRECT,	)	(Dist. of Colo.)
	)	
Defendant-Appellee.	)	
	)	
----------	)	
	)	
DAVID L. SMITH,	)	
	)	
Attorney-Appellant.	)	
	)	

REPLY BRIEF FOR ATTORNEY-APPELLANT DAVID L. SMITH

In their answer brief, U S West Direct and its attorneys charge that by filing and pursuing this appeal, Mr. Smith is attempting to re-litigate issues already determined by this court or foreclosed by previous determinations of this court, in violation of orders issued

by this court in previous cases. However, the issues raised and argued by Mr. Smith in these previous cases were different from those raised and argued by him in the present case. The parties were also different. In two of these previous cases, the burden of proof was different. In all of these previous cases, this court refused to address the issues raised and argued by Mr. Smith--a blatant and egregious violation of his First Amendment right to access to the courts to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision pursuant to 28 U.S.C. § 1291. See Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("the obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996) ("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984) ("every party is entitled to a full, considered, and impartial review of the

decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997). Nor did this court give any independent reasons for its decisions. See id. This court merely affirmed the orders issued by the district court, which also refused to address the issues raised and argued by Mr. Smith--another blatant and egregious violation of his First and Fifth Amendment rights. See id.; see also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423

U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Razotos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Collie v. Vought Aircraft Company, U.S. App. LEXIS 9479 (5th Cir. May 12, 1998), a copy of which is attached hereto. Therefore, by filing and pursuing this appeal, Mr. Smith is not attempting to re-litigate issues that have already been determined by this court or foreclosed by previous determinations of this court, in violation of orders issued by this court in previous cases.[1] Instead, Mr. Smith is

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[1]In other words, Mr. Smith is not attempting to litigate issues barred by the doctrines of res judicata and collateral estoppel, which have no application where, as in the present case, the appellant did not have a full

attempting to litigate meritorious issues that this court and the district court have steadfastly refused to decide on their merits.[2] Further, since U S West Direct and its attorneys are charging Mr. Smith with violating this court's previous orders, they are charging him with what amounts to criminal contempt; and he is therefore entitled to a full criminal process, including his Sixth Amendment right to a trial by jury on these charges.[3] See Gompers v. Bucks Stove

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and fair opportunity to litigate his federal claims. See Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

[2]Since the issues Mr. Smith is attempting to litigate are well grounded in fact and are warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or to establish new law, the charge made by U S West Direct and its attorneys in their answer brief that these issues are "frivolous" is clearly false. See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent).

[3]As a matter of the equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely

& Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed.2d 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). At the very least, Mr. Smith is entitled to an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence on his affirmative defenses and mitigating circumstances to the charges being brought against him, including evidence of his financial inability to pay the harsh and unjustified sanctions being requested by U S West Direct and its attorneys in

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because he is being charged in an answer brief rather than in an order to show cause why he should not be held in contempt for allegedly violating this court's orders. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); Bodie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

their answer brief.[4] See Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razotos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Collie v. Vought Aircraft

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[4]Mr. Smith has a current negative net worth of more than $400,000.00. Due to his disbarment from the practice of law in this court and the United States District Court for the District of Colorado, and his indefinite suspension from the practice of law in these courts and the courts of the State of Colorado, Mr. Smith has no income from which his negative net worth could be reduced, or from which the harsh and unjustified sanctions being requested by U S West Direct and its attorneys could be paid. See Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948) (impossibility of performance constitutes a defense to contempt); United States v. Rylander, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) (the court must consider present inability to comply with the order in question); Tinsley v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir. 1986) (citing Maggio v. Zeitz).

Company, U.S. App. LEXIS 9479 (5th Cir. May 12, 1998). Mr. Smith hereby specifically requests an evidentiary hearing on these matters if this court denies his request for a trial by jury. However, since it is reasonably questionable whether this court could be a fair and impartial decision-maker in any matter involving Mr. Smith, he requests that this appeal be transferred to the United States Court of Appeals for the Federal Circuit for decision.[5] See 28 U.S.C. § 455(a); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias is grounds for reversal); Offut v. United

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[5]Mr. Smith is a member in good standing of the bar of the Federal Circuit, and he believes that the judges of the Federal Circuit could and would render a fair and impartial decision in this appeal.

States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.2d 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). Mr. Smith requests such other and further relief as may be just under the circumstances, including an order dismissing with prejudice the clearly frivolous and groundless charges U S West Direct and its attorneys are bringing against him for the clearly improper purpose of depriving him of his First and Fifth Amendment rights to litigate meritorious issues that this court and the district court have steadfastly refused to decide on their merits.

While Mr. Smith denies that he has abandoned his appeal of Judge Weinshienk's denial of his Motion to Intervene Pursuant to Fed. R. Civ. P. 24, this court has pending before it a Motion for Mr. Smith to Intervene and/or to Represent Ms. Marks on a Hardship Basis. Mr. Smith requests an expedited resolution of this Motion in order to avoid further prejudice to his and Ms. Marks' rights.

Dated this 1st day of July, 1998.

Respectfully submitted,

David L. Smith
Pro Se Attorney-Appellant
1630 Welton Street, # 300
Denver, Colorado 80202
(303) 534-0153

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 1998, true and correct copies of the foregoing Reply Brief for Attorney-Appellant David L. Smith were placed in the United States mail, postage prepaid, addressed as follows:

Renee Marks
4300 Hummingbird Drive
Fort Collins, Colorado 80526

Raymond W. Martin, Esq.
Nancy E. Berman, Esq.
PARCEL, MAURO & SPAANSTRA, P.C.
1801 California Street, Suite 3600
Denver, Colorado 80202